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February 2021

Covid-19 Vaccine- Draft guideline for employment.

Context - Introduction

The first shipment of the Pfizer vaccine is due to reach New Zealand by April and will be available to border staff and essential health workers in the first instance.

Current indications are that at least 70 per cent of the population will need to be vaccinated in order to achieve herd immunity.

We provide short guidance on the vaccine and employment related issues below. We recommend employers take a cautionary approach and seek legal advice when considering vaccination issues in the workplace.

Busting the myths (addressing anti-vaxxers)

- you cannot get Covid-19 from being vaccinated as vaccines do not contain “live” or “active” pathogens.
- Instead they contain “instructions’ which teach cells how to create their own vaccines and to trigger the immune system.
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CAN I MAKE MY STAFF GET THE COVID-19 VACCINE?

No – with some very limited exceptions

The New Zealand Bill of Rights Act 1990 provides helpful guidance in defining personal rights as it relates to medical treatment. Under the Act, medical treatment requires informed consent.



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It is reasonable to suggest/request your people be vaccinated in order to “increase the safety of themselves and others and the organisation”.

Our analysis is the starting position at law is that employers cannot compel employees to be vaccinated for Covid-19. In some very limited circumstances, it may be considered a reasonable instruction to require vaccination where there is evidence that vaccination will significantly reduce the health risks of employees or improve business efficiency and where no other available options to employers provide equally effective protection against the risks of exposure to Covid-19.

In such circumstances, employers will likely first have to consider less intrusive, risk mitigation strategies from the use of PPE and social distancing, to amendments to employees’ roles and responsibilities to minimise risk of exposure to Covid-19. If, under the circumstances, other reasonable risk management strategies do not sufficiently mitigate the risk of exposure, it may be reasonable for employers to then require employees to be vaccinated, where good evidence of that can be provided. This will likely only be appropriate where employees are subject to high levels of potential exposure to people infected with Covid-19, such as those working at the nation’s border, frontline health care and aviation services, subject to protected categories of discrimination discussed below.

Given that New Zealand workplaces have continued to operate more or less safely up until now without the added protection of vaccines, it may be difficult for employers to take the position that people who cannot, or will not, be vaccinated. have suddenly become a significant risk and therefore require vaccination.

COULD I INCENTIVISE MY EMPLOYEES TO GET VACINATED?

Yes - This would be at your discretion.

Options could include:

- Utilising sick leave to get the vaccination
- Paying a one-off bonus payment to those that get vaccinated
- Paying travel costs for anyone that has to travel to receive the vaccine
- Paying if it requires time off work
- Compensation for getting the vaccinated to keep the company safe, rather than a health a safety requirement.



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CAN I INSIST ON A NEW EMPLOYEE HAVING A VACCINE OR
HAVING ALREADY BEEN VACCINATED?

Yes – with some exceptions

An employer could request vaccination records with a stated purpose, if it can clearly show why it requires access to that information and manages that personal information in line with the principles of the Privacy Act 2020.

However, subject to breaching the prohibited grounds of discrimination in the Human Rights Act 1993, an employer can place any reasonable conditions on the employment of new staff.

While it is possible to insist new employees are vaccinated for Covid-19, this will require consideration on a case by case basis and employers should avoid blanket rules. If a prospective employee were to refuse vaccination, employers would need to consider carefully the reasons for that refusal. If refusal is based on a protected ground of discrimination, employers should consider non-enforcement of any vaccination policy to avoid claims of discrimination.



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CAN I DISMISS SOMONE WHO WON'T GET VACCINATED?

No – except in very limited circumstances

It will generally be unlawful to dismiss someone who refuses vaccination, and doing so will present significant risk of a finding of unjustified dismissal, claims of discrimination and breach of the Human Rights Act.

As set out above, in very limited circumstances it may be possible to consider termination of employment where:

- The employee is in a role that subjected them to significant risk of contracting Covid-19 in their day-to-day duties (e.g. healthcare worker or in the aviation industry);
- The employer considers all reasonable alternative risk management methods as alternatives to vaccination;
- The employer considers whether it is reasonable to alter the employee's duties or redeploy the employee elsewhere in the company as an alternative to vaccination;
- That the employees reasons for non-vaccination are not a protected ground of discrimination under the Human Rights Act or are due to health related issues (such as allergies); and
- If, after investigating and concluding there are no reasonable alternatives to manage the risk of exposure to Covid-19 as effectively as vaccination, only then could an employer consider terminating the employment relationship. We recommended exercising extreme caution and seeking legal advice before taking any such action.



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IS IT DISCRIMINATION IF I WON'T EMPLOY AN ANTI-VAXER?

YES

Everyone is protected from unlawful discrimination in their employment, this includes on the grounds of religious or ethical beliefs. If, beliefs that are held by a prospective employee are not reasonably held beliefs (for example based on conspiracy theories), such beliefs would not be protected grounds of discrimination under the Human Rights Act.

Examples for Refusing the Vaccination:	
Religious Grounds	Discrimination
Beliefs	Discrimination
Fear of getting Covid	This is unlikely as any belief that getting Covid from vaccination at this stage is not substantiated and would arguably be a conspiracy theory
Allergies	Discrimination
Medical Reasons (including Pregnancy)	Discrimination
Conspiracy Theories	Anything that cannot be classified as a reasonable held belief will not likely be discriminatory